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In The

Supreme Court of the United States

SUPREME COURT, U. S.
FILED
JUN 25 1976
MICHAEL RODAK, JR., CLERK

October Term, 1975

No. 75-1233

REA EXPRESS, INC., a Bankrupt,

Petitioner,

vs.

CIVIL AERONAUTICS BOARD,

Respondent,

AIRLINES PARTICIPATING in AIR EXPRESS SERVICE, AIR FREIGHT FORWARDERS ASSOCIATION, AMERICAN RETAIL FEDERATION, BROTHERHOOD of RAILWAY and AIRLINE CLERKS, NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, DRUG and TOILET PREPARATION TRAFFIC CONFERENCE, and EASTERN INDUSTRIAL TRAFFIC LEAGUE, PET INDUSTRY PARTIES, EMERY AIR FREIGHT,

Intervenors.

PETITION FOR REHEARING

ARTHUR M. WISEHART
WISEHART, FRIOU & KOCH
Attorneys for Petitioner
150 East 42nd Street
Fourth Floor
New York, New York 10017
(212) 557-8800

8847

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REA Express, Inc., a Bankrupt,

Petitioner,

vs.

Civil Aeronautics Board,

Respondent,

Airlines Participating in Air Express Service, Air Freight Forwarders Association, American Retail Federation, Brotherhood of Railway and Airline Clerks, National Small Shipments Traffic Conference, Drug and Toilet Preparation Traffic Conference, and Eastern Industrial Traffic League, Pet Industry Parties, Emery Air Freight,

Intervenors.

PETITION FOR REHEARING

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PRELIMINARY STATEMENT

This petition for rehearing is respectfully submitted pursuant to Rule 58(2). It is submitted on behalf of C. Orvis Sowerwine, Esq., Trustee in Bankruptcy of REA Express, Inc., a bankrupt, petitioner ("REA"). It relates to a petition for a writ of certiorari denied on June 1, 1976.

REASONS FOR REHEARING

The trustee in bankruptcy respectfully seeks this Court's consideration of the Reply Brief filed May 27, 1976, and re-submitted herewith, which was not previously considered for the reasons set forth in the attached certificate of counsel.

The bankruptcy proceeding is in a critical stage. The trustee and the Bankruptcy Judge, Honorable John J. Galgay, in the United States District Court for the Southern District of New York (75-B-253), currently have under serious consideration proposals for restoration of express services. These proposals are of great importance to the bankrupt estate. One such proposal contemplates the possibility of restoring Air Express services with modifications which might be acceptable to the Civil Aeronautics Board and in the public interest. This possibility should not be foreclosed by a potential *res judicata* problem created by the decision below.

CONCLUSION

Based upon the points in the Reply and the circumstances involving the bankrupt estate, the judgment below should be vacated and the cause remanded for dismissal on grounds of mootness or abatement.

Respectfully submitted,

s/ Arthur M. Wisehart

WISEHART, FRIOU & KOCH
Attorneys for Petitioner

CERTIFICATE OF COUNSEL

The foregoing petition for rehearing is submitted in good faith and not for delay, in accordance with Rule 58(2). Further, said petition is restricted to substantial grounds available to petitioner and not previously presented for the reasons set forth below.

On June 1, 1976, the date on which REA's petition for a writ of certiorari was denied, the Clerk's Office returned to us the Reply Brief which we had filed on behalf of REA on May 27, 1976, with the explanation that "The brief was received too late for the Court's consideration prior to the denial of the petition." A copy of the letter from the Clerk's Office is annexed hereto as Exhibit A.

The Reply Brief with the date stamp showing that it was filed on May 27, 1976 is annexed hereto as Exhibit B.

On June 1, 1976, I was informed of this development in a telephone conversation with the Clerk's Office. I learned in that conversation that the government's brief in opposition on behalf of the Civil Aeronautics Board was filed with the Court on May

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13, 1976, and immediately distributed upon receipt. Our copy of the government's brief was received by mail on May 17, 1976.

The Clerk's Office also told me in the same telephone conversation that the petition was considered by the Court at its conference on May 27, 1976. Our Reply Brief came on that day, but after the Court's conference, and therefore was not considered by the Court.

Rule 24(4) states that replies may be filed but that distribution of the case will not be delayed pending the filing of such briefs.

On the same day that I received the government's brief, May 17, 1976, I called the Clerk's Office to obtain an indication of when the reply should be in to be considered. The answer is reflected in my memorandum to the trustee, a copy of which is annexed hereto as Exhibit C: "I am informed by the Clerk's Office that, if we submit a reply within two weeks, it will be considered."

Two weeks from May 17 would be May 31, a holiday. My partner Robert E. Friou, Esq., also called, as I was out of town, on May 24 or May 25, and was told in substance that receipt of the reply by Friday, May 28, would be in sufficient time. As noted above, it was in fact filed on May 27.

When I learned what had happened, I spoke by telephone with Mr. Rodak on June 1, 1976. Mr. Rodak as usual was very courteous and helpful. He explained that a petition for rehearing is now the only means available for bringing the points in the reply to the Court's attention.

The trustee in bankruptcy urgently requests that these points be considered because of the present situation of the bankrupt.

Respectfully submitted,

s/ Arthur M. Wisehart

WISEHART, FRIOU & KOCH
Attorneys for Petitioner

EXHIBIT A

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

June 1, 1976

Arthur M. Wisehart, Esquire
Wisehart, Friou & Koch
219 East 42nd Street
New York, NY 10017

RE: REA EXPRESS INC., ETC.
vs. CAB, No. 75-1233

Dear Mr. Wisehart:

I return herewith your Reply Brief in the above entitled case. The brief was received too late for the Court's consideration prior to the denial of the petition.

Very truly yours,

MICHAEL RODAK, JR.,
CLERK

s/ W.V. Gullickson
W.V. Gullickson
Assistant Clerk

EXHIBIT B

Reply Brief on Behalf of Petitioner is attached to this petition in its entirety.

EXHIBIT C

WISEHART, FRIOU & KOCH
FOURTH FLOOR
150 East 42nd Street
New York, N.Y. 10017

212-687-7090

May 17, 1976

C. Orvis Sowerwine, Esq.

Enclosed is a copy of the CAB's brief in opposition to our petition for certiorari in the Air Express case. I am informed by the Clerk's Office that, if we submit a reply within two weeks, it will be considered. My suggestion would be to file a very short reply emphasizing that you have two proposals for the revival of the company under consideration, and to ask that the Court not foreclose the Air Express possibility.

Arthur M. Wisehart

Enclosure

cc w/encl.: Donald L. Wallace, Esq.